Supreme Court of the United States.

October Term 1887.—No. 1025.

UNITED STATES, Appellant,

vs.

THE STATE OF LOUISIANA, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

WM. E. EARLE,
Attorney for Appellee.

Press of Thomas McGill & Co., Washington, D. C.

siana, held in the custody of this office for the Indian Trust Fund, representing interest from November 1, 1874, to May 1, 1887, the dates named in your request, amounting to $29,970. There are also coupons representing interest due November 1, 1887, amounting to $1,110.

Respectfully yours,

JAMES W. HYATT,
Treasurer United States.

Supreme Court of the United States.

October Term 1887.—No. 1025.

UNITED STATES, Appellant,

vs.

THE STATE OF LOUISIANA, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

WM. E. EARLE,
Attorney for Appellee.

Press of Thomas McGill & Co., Washington, D. C.

IN THE

Supreme Court of the United States.

October Term 1887.—No. 1025.

UNITED STATES, APPELLANT,

vs.

THE STATE OF LOUISIANA, APPELLEE.

Appeal from the Court of Claims.

BRIEF FOR APPELLEE.

This suit was brought by the State of Louisiana upon two causes of action. The first was for the sum of $47,530.79, founded on the statute of February 20, 1811, entitled "An act to enable the people of the Territory of Orleans to form a Constitution and State Government" (2 Stat. L., p. 641), the last section of which reads as follows:

"*And be it further enacted*, That five per centum of the net proceeds of the sales of the lands of the United States after the first day of January shall be applied to laying out and constructing public roads and levees in the said State as the Legislature thereof may designate."

The second was for the sum of $23,855.04, founded on the act of September 28th, 1850, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp land within their limits" (9 Stat. L., 519); and the further statute of March 2d, 1855, entitled "An act for the

relief of purchasers and locators of swamp and overflowed land." (10 Stat. L., 634.)

To both causes of action the defendant pleads a set-off, viz., a balance debited to the plaintiff on account of uncollected direct taxes under the act of August 5, 1861, (12 S. L., 292), and the amendatory act of June 7, 1862, (12 S. L., 422); and to the second cause of action the defendant interposes also a plea of the statute of limitations. The petition was filed September 20, 1886.

THE SET-OFF.

The plaintiff submits that it is not in mutual rights, in this—

I. The direct tax was in no legal sense a debt of the State of Louisiana in her corporate and sovereign capacity, but was by the very terms of the act laid solely upon the lands of the State—"upon all the lands and lots of ground situate therein," and each and every parcel is "charged with the payment of so much of the whole tax laid and apportioned by said act upon the State or Territory wherein the same is respectively situate as shall bear the same direct proportion to the whole amount of the direct tax, apportioned to said State or Territory, as the value of said parcels of land shall respectively bear to the whole valuation of the real estate in said States or Territories." (Sec. 1 of Act of June 7, 1862.)

Some of the *lands* of Louisiana have paid their taxes; some have not.

If this claim can be thus set-off, those who have paid will be paying a second time. Those citizens and taxpayers who owned no lands will be paying a tax which the law never imposed on them.

By section 53 of the act of August 7, 1861, the States respectively were offered a discount to induce them to *assume* the direct tax. But if this provision of the act was applicable to the insurrectionary States, it is sufficient to note that Louisiana never "assumed" it. That section con-

tained a proviso that if any State should *assume* the tax, it should be liable to be paid and satisfied, in whole or in part, by the release of such States "of any liquidated and determined claim of such State." In Turner *v.* Smith, 14 Wall., 563, this Court says: "It is clearly a direct tax *on the land, and* on all the estates, interests, and claims connected with or growing out of the land. Clearly the tax was, in no sense, a debt of the States."

The attempted set-off is illegal.

The principle to warrant a set-off is, that the debts must be so clearly stated, and be held in mutual rights, as to raise an implied mutual credit. The law applicable to the state of facts here presented is so well settled that it need not be enforced by authorities, but this Court says: "Personal debts are only set-off to each other, or compensated the one by the other, by operation of law, when they are of the same personal character. A partnership debt is not thus offset or compensated by a demand of one individual member against the creditor. There is no mutuality in such cases between the parties. (Beauregard *v.* Case, 91 U. S., 141.)

I shall hereafter show that these two causes of action are not only payable by the Government as trust funds, but that when paid they pass into the treasury of Louisiana, impressed with a specific trust by the very statutes under which they arise, as declared by this Court. So that if otherwise mutual, and the subject of set-off, the fact here stated would prevent absolutely.

The Five Per Cent.

This fund arises under the act admitting the State of Louisiana into the Union of States, and by that very act it is in express terms impressed with the specific trust that it is to be "applied to laying out and constructing public roads and levees in the said State, as the Legislature thereof may designate."

THE SWAMP LAND.

The cause of action on this claim arises under the second statute herein quoted. That statute was passed to remunerate the States for land located by grants from the United States for lands which, from their character as swamp and overflowed land, had become the property or right of the State under provisions of the act of September 28, 1850, commonly known as the "Swamp Land Act;" and, to effectuate that policy, it is provided in the second section of said act of 1855—

"That upon due proof, by the authorized agent of the State or States before the Commissioner of the General Land Office, that any of the land, within the true intent and meaning of the act aforesaid, had been *sold by the General Land Office*, the purchase-money shall be paid over to the said State or States."

The provisions of these acts are embraced in the Revised Statutes of the United States, sections 2479–2480, and the following: The duty of the Commissioner of the General Land Office as to these acts is declared in section 2478. It is to carry into execution every part of them by appropriate regulations.

Whilst, therefore, upon due proof by the State, before the Commissioner, that any lands coming within the provisions of these acts had been sold by the United States, they were to be paid for by the United States to the State in which they were situated, no laches can be imputed to the State, for the reason that section 2 of the Act of 1850 (section 2480, 2481, R. S.) devolves it upon the Secretary of the Interior "to make accurate lists and plats" of all such lands, and prescribes the mode of making them; also, that he shall transmit the same to the Governors of the several States. Now, it is not pretended that any such lists were ever transmitted to the Governor of Louisiana (or any other Governor, for that matter), but it is stated, and truly,

of course, by Government counsel below, on pp. 8–9 of his brief in the Court of Claims, that "the Commissioner of the General Land Office, on his own motion, adopted the field-notes of the Surveyor General."

Whilst, therefore, the statute gave to the State the right of making proofs, &c., it is clear that this was conferred only as an additional protection and safeguard to the rights vested in the State by the Acts, for the duty of executing the law in its every part was not only generally, but, as to its particular provision, specifically, devolved upon the officers of the United States.

After the Act of 1849 (9 S. L., 352)—it was that of 1850 as to the other States—granting them lands for the express purpose of enabling them "to construct the necessary levees and drains to reclaim" them, some of them were innocently sold by the United States, and it was as to those solely that the United States was liable to make repayment. The United States, the grantor holding the legal title, had, in violation of its grant, sold that legal title to the detriment of the State which was the equitable owner of the land by virtue of the grant; and it was to remedy this inadvertent wrong that the Act of March 2, 1855, was enacted. Now, independent of this Act, I submit that, as between individuals, a trust would have been "superinduced upon this transaction by operation of law, as matters of equity, independently of the particular intention of the parties;" and were by this Act to remedy this wrong done, a trust is "deducible from the nature of the transaction as matter of intent." A long period of practice, with repeated rulings of the Department under opinions of Attorneys-General, show a complete recognition of this trust by the Government. It was under the Act of 1855 for the Commissioner of the General Land Office to ascertain which of the lands were "swampy" and which of them had been "sold," "located," "entered," "either with cash, or with land warrants, or with scrip," before

"the purchase-money shall be paid over to the said State," and this responsibility and duty was not only devolved upon him by the law, but he alone had the data and the machinery with which to do this. In the discharge of his duty in the case of the State of Oregon (3 Land Decisions, 334) he sent a special agent to examine the character of the lands and the facts "on the ground." In the same volume, at p. 390, is an allowance of a similar claim to Ohio on February 20, 1885. And, at p. 396, an allowance of a similar claim to Louisiana on February 12, 1885. In vol. 4, p. 2, on July 1, 1885, a similar allowance to Illinois; on p. 371, on February 5, 1886, is an allowance of a similar claim to California; on p. 415, a similar claim on February 25, 1886, is allowed to Michigan, and on p. 295, on August 15, 1885, one to Arkansas.

In the Ohio case (vol. 3, p. 583) is an opinion of Mr. Attorney-General Garland, dated *May* 6, 1885, as to an account for lands sold between *September* 28, 1850, and *March* 3, 1857, wherein he says: "In my opinion such approval is fully warranted."

In Vol. 15 of the Opinions is one by Mr. Attorney-General Devens, dated July 25, 1877, wherein he holds that the revision of the statutes "could not affect the rights which had accrued to the States," under the Act of March 3, 1857, by the omission of the indemnity clause.

Not only, then, does the United States become a trustee as to this fund, under the act of Congress to remedy the inadvertence whereby these lands were sold or patented to individuals after being expressly granted to the State, but the officer of the United States whose duty it is made by statute "to enforce and carry it into execution" alone has the data by which to determine what lands were "swampy," and of these which had been sold or patented by him, and these were the origin of the fund.

The Commissioner of the General Land Office has by law exclusive jurisdiction in all matters "appertaining to the

surveying and sale of the public lands of the United States," and power to "audit and settle all public accounts relating to the public lands." (See Baldwin *v.* Stark, 107 U. S., 465; Marquez *v.* Frisbie, 101 U. S., 473; Shepley *v.* Cowan 91 U. S., 331.)

The only possible thing that Louisiana could have done would have been to have asked a mandamus against him to "put him in motion," and a complete answer to this application would be that he was using the force allowed by appropriations of Congress to the best advantage in the work, and with due regard to the demands and interests of the public service.

The repudiation of a trust must be clearly and unequivocally made known to the *cestui que* trust. (Speidel *v.* Henrici, 120 U. S., 386.)

THERE COULD BE NO BAR OF THE STATUTE UNTIL KNOWLEDGE WAS BROUGHT HOME TO THE GOVERNOR OF LOUISIANA THAT THE UNITED STATES HAD REPUDIATED THE TRUST BY ENTERING IT AS A CREDIT IN THE TREASURY DEPARTMENT.

But not only is this fund under the Acts of Congress impressed with a trust in its adjustment by the United States, but the original act granted these lands to the State for a specific use and purpose, and the fund when received by the State is impressed with a trust to apply it in the specific manner provided by statute.

In the case of the Emigrant Company *v.* County of Wright (97 U. S., 339) this Court very fully declares and explains the nature of this trust, and set aside a contract made in pursuance of an Act of the Legislature of Iowa, which the Court regarded as subversive of that trust. The question came before the Court again in the case of the Emigrant Company *v.* County of Adams (100 U. S., 97), and whilst the Court seems to abate naught from its decision as to the fund being a trust "to the several States in

which they lie for the purpose expressed upon the face of the Act," it concludes that the Act of the Legislature of Iowa, and the contract made in pursuance thereof, were not subversive of the trust; that the execution of the trust rests upon the good faith of the State, to be exercised "in its discretion without being liable to be called to account, and without affecting the titles of the lands disposed of." And that Congress "has the power to enforce the conditions of the grant, either by a revocation thereof, or other suitable action, in a clear case of violation of the conditions." (See, also, Mills County *v.* R. R., 107 U. S., 557.)

I submit, therefore, that upon this construction of the act, the fund cannot be applied to a debt of the State, much less to the payment of somebody else's debt, but that it must be paid to the State to be applied in good faith to the specific purposes for which it was granted by Congress.

JURISDICTION.

The defendant assigns for error that the Court of Claims has not jurisdiction of a suit by a State.

This Court is so familiar with all questions of Federal jurisdiction that counsel can scarcely hope to aid it in connection with that subject.

The original jurisdiction of the Supreme Court is not made exclusive by the Constitution. (Ames *v.* Kansas, 111 U. S., 449.)

We may freely admit that the Judiciary Act of 1789 (section 687 of Revised Statutes) made this jurisdiction *exclusive* "where a State is a party," except between a State and its citizens, citizens of other States, and aliens, for the provision is simply inapplicable to suits against the United States, and they were not provided for until long thereafter.

The eleventh amendment exempts a State from suit by citizens of another State, but this is an immunity. There is nothing in it, or in art. 3, section 2, which exclu d s -

gress from giving to the States the right to sue in the Federal Court, and the act of March 3, 1875 (18 S. L., 470) extends the jurisdiction of the Circuit Court of the United States to all cases "arising under the Constitution or laws of the United States." And this, you have held, (page 471 case above cited,) makes the jurisdiction of the Circuit Court coextensive with the judicial power of this Court, except as to its exclusive jurisdiction fixed by the Constitution.

See also Böva *v.* Preston, 111 U. S., 253.

This decision and this construction of the act of 1875 seems to eliminate whatever of argument may be deduced by analogy from the construction of the act of 1789, or its revision. (Section 687.)

Statute as to Court of Claims.

We turn now to the simple language prescribing the jurisdiction of the Court of Claims. The first section of the grant is:—The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress.

This is a division, not as to parties, but as to subject-matter. Congress had full and complete power over the whole subject-matter. It could give jurisdiction to such tribunal over such causes of action on behalf of such parties against the United States as it chose. It saw proper to fix this jurisdiction without limitation or regard to the parties, and having done so, the only question which can logically arise is, whether a State has the same general power of

maintaining suits which is professed by individuals and corporations.

In 1 Dillon, a Municipal Corporation (sec. 14 p. 106): "Like corporations, however, a State, as it can make contracts and suffer wrongs, so it may, for this reason, and without express provision, maintain, in its corporate name, actions to enforce its rights and redress its injuries."

WM. E. EARLE,
Att'y for Appellee.

143-92

In the ~~Court of Claims~~ Supreme Court.

United States
vs.

STATE OF LOUISIANA
vs.
~~THE UNITED STATES~~

No. ~~15,295~~ 1025

Plaintiff's Brief on Motion of Defendant.

The motion of the defendant presents the question whether this court has jurisdiction "to hear and determine a matter" on the petition of a State setting forth a right or claim founded upon an act of Congress. The right or claim of the State is indisputably founded on acts of Congress, and under these acts the State is certainly entitled to what she claims.

See Act admitting Louisiana, vol. II, S. L., p. 641.
Swamp-Land Act, IX S. L., 519.
Five-per-cent. Cases, 110 U. S., 471; 97 U. S., 339; 100 U. S., 67.

Whether this court has jurisdiction to hear and determine the claim of the State of Louisiana against the Government of the United States, founded upon the laws of Congress mentioned in the pleadings, depends upon the construction of the following language in section 1059 of the Revised Statutes:

"The Court of Claims shall have jurisdiction to hear and determine the following *matters:*

"First. All claims founded upon any law of Congress,

* * * or upon any contract, express or implied, with the Government of the United States," &c.

The language used to define the jurisdiction of the court is general, comprehensive, and unlimited and unqualified, except in two essential particulars: (1) It must be a claim; (2) it must be a claim founded upon a law of Congress or a contract with the Government. The character of the claim is specified, but there is no allusion to the kind, description, qualities, or character of claimants or parties. The *subject-matter* of the jurisdiction is specifically defined.

No mention is made of the *parties* who may become actors in calling upon the court to exercise its jurisdiction. In the absence of all limitation as to the parties who may ask the court to hear and determine such claims, the rule of construction is unquestioned that the court can impose no limitations, and must hear and determine the claims of *all parties who are capable of becoming actors in any judicial tribunal.*

It cannot be denied that this court has jurisdiction of the subject-matter, it appearing on the record to be a matter—a claim founded upon laws of Congress, and a contract by laws of Congress between the State of Louisiana and the Government of the United States.

In the language of Justice Miller, 102 U. S., 144, "The cause of action is founded on the acts of Congress; the relief which is prayed is a relief *dependent on* an act of Congress; the right to be enforced in the suit is a right which *rests* upon an act of Congress."

The only question, then, involved in defendant's motion is, has this court jurisdiction of the parties, or can this court "hear and determine a claim by a State against the United States founded upon acts of Congress?" The United States cannot be sued *in any court* without its consent; not even in the Supreme Court of the United States. Its consent is indispensable to confer jurisdiction over it in any court.

(Case *v.* Terrell, 11 Wall., 199.) Is the State suable in any court without its consent? Certainly not; unless in the Supreme Court of the United States. If suable in the Supreme Court, it is under that provision of the Constitution which confers "original" jurisdiction in cases where a State shall be a party. The exemption from suit of both Governments without their consent is on account of their dignity and sovereignty.

Can a State sue the United States in the *Supreme Court* under the clause which gives original jurisdiction where a State is a party? Does the giving "original jurisdiction" to the Supreme Court in cases where a State is a party confer upon the State the right to sue the United States in that court without the *consent* of the United States? If not, then it is certain no such consent has been given to the State to bring this suit in the Supreme Court.

The question recurs, Has the United States consented, in section 1059, that a State may bring suit against it for a claim against the United States founded on a law of Congress? When a State *voluntarily comes* into *court*, and becomes the sole actor, and asks this court to exercise its jurisdiction over a claim of the State against the Government of the United States founded upon an act of Congress, such action by the State necessarily amounts to giving its consent that the jurisdiction of this court may be exercised, and that the State will be bound by the judgment of this court.

In Ames *v.* Kansas, 111 U. S., 465, Chief Justice Waite says:

"With respect to States, it was provided that the jurisdiction of the Supreme Court should be exclusive in all controversies of a civil nature where a State was a party, except between a State and its citizens, and except, also, between a State and *citizens of other States* or *aliens*, in which latter case its jurisdiction should be original, but *not exclusive*. Thus the original jurisdiction of the Supreme Court was made concurrent with any other court to which juris-

diction might be given in suits between a State and citizens of other States or aliens. No jurisdiction was given in such cases to any other court of the United States, and the PRACTICAL *effect of the enactment was, therefore, to give* the Supreme Court exclusive original jurisdiction in SUITS AGAINST A STATE BEGUN WITHOUT ITS CONSENT, *and to allow the State to sue for itself in any tribunal that could entertain its case. In this way* STATES, *ambassadors, and public ministers were protected from the compulsory process of any court other than one suited to their high positions, but were left free to seek redress for their own grievances in any court that had the requisite jurisdiction.* NO LIMITS WERE SET ON THEIR POWERS OF CHOICE IN THIS PARTICULAR."

When the State comes into this court, then, *voluntarily*, and invokes its jurisdiction to hear and determine a "matter"—a claim of the State against the United States founded on a law of Congress—all the reasons cease why this court should not exercise such jurisdiction, unless prohibited from doing so by some positive law or public policy.

The two Governments are the sole parties in this proceeding, and there can be no valid reason or well-founded implication that compels this court to *deny itself the jurisdiction, and drive the State to the legislative power of Congress for relief.*

The distinction presented between jurisdiction dependent on the character of the parties, and jurisdiction dependent upon the character of the subject-matter, claim, or cause of action, is strongly supported in adjudicated cases.

In Cohens *v.* Virginia, 6 Wheat., 264, the court says:

"The words of the Constitution are in all cases affecting embassadors, &c.; and those in which a State shall be a party the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction. This distinction between original and appellate jurisdiction excludes, we are told, in all cases, the exercise of the one where the other is given. The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it ap-

pellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. Those provisions of the Constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this court is original; *if a case arise under a constitution or a law, the jurisdiction is appellate.* But a case to which *a State is a party may arise under the Constitution or a law of the United States.* What rule is applicable to such a case?

"What, then, becomes the duty of the court? Certainly, we think, so to construe the Constitution as to give effect to both provisions, as far as it is possible, to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

"*In one description of cases the jurisdiction of the court is founded entirely on the character of the parties,* and the *nature of the controversy* is not contemplated by the Constitution. The *character of the parties* is everything, the *nature of the case* nothing. In the other description of cases the jurisdiction *is founded entirely* on the character of the case, and the parties are not contemplated by the Constitution. In these the *nature of the case is everything,* the character of the parties nothing. Jurisdiction is given in the one case *because a State is a party, and in the other because the case arises under the Constitution* or a law."

If the Court of Claims is unable under the law creating it to exercise the jurisdiction invoked by the State of Louisiana, it can be for no other reason than that Congress has no power under the Constitution to confer it, simply because that instrument provides that, in cases where a State shall be a party, the Supreme Court shall have original jurisdiction. Does this provision in the Constitution prohibit Congress from conferring upon any inferior court jurisdictional power where a State is a party?

The power has been exercised by Congress and upheld by the highest court in many cases involving the question of original and appellate jurisdiction of inferior courts.

In Tennessee *v.* Davis, 100 U. S., p. 270, the court says:

"In The Mayor *v.* Cooper (6 Wall., 247) the validity of the Removal Acts of 1863, (12 Stat., 756) and its amendment of May 11, 1866, (14 Id., 1866,) which embraced not only civil cases, but criminal prosecutions, and authorized their removal before trial, came under consideration, and it was sustained. This court then said: 'The Constitutional power is given in general terms. No limitation is imposed. The broadest language is used. "*All cases*" so arising are embraced. How jurisdiction shall be acquired by the inferior court (of the United States), "whether" it shall be original or appellate, or original in part and appellate in part, and the manner of procedure in its exercise after it has been acquired, is not prescribed. This Constitution is silent upon these subjects. They are remitted without check or limitation to the wisdom of the legislature. "Jurisdiction, original or appellate, alike comprehensive in either case, may be given. *The Constitutional boundary-line of both is the same.*'"

The power of Congress to authorize the removal from State to Federal courts of cases in which a State is a party cannot be questioned, and is strictly analogous to the power exercised to confer jurisdiction in this case. If Congress can confer jurisdiction on an inferior court in cases where a State is a party, it has certainly done so in section 1059, by the general, comprehensive, and unlimited words employed, without any qualification as to their *scope* and *operation in that section*, except as to *other provisions therein more specifically defining and limiting jurisdiction over subject-matter or claims.*

The law-makers understood that the language employed by Congress in section 1059 *was unlimited as to the claimants or parties*, and that under the operation of the words "*all claimants*," whether persons or corporations, individuals, public or private corporations, corporate bodies—municipal, town, city, county, or *State*—could come into this court and ask it to hear and determine any claim against the Government of the United States founded upon a law

of Congress. Knowing such to be the *scope* and *operation* of the words used in section 1059 *as to parties*, Congress imposed limitations as to parties in sections 1066, 1067, 1068, and 1073. Under section 1059 aliens could have sued without any restriction put upon them had it not been for the limitations and prohibitions as to certain aliens contained in section 1068.

The whole act of Congress creating this court and defining its jurisdiction, and all the legislation of Congress in relation to its jurisdiction, clearly show that section 1059 *includes all claimants*, and none are excluded except in the other sections named and passed for that purpose.

When Congress undertook to restrain and limit the operation of section 1059 as to parties or claimants who could sue, this court is bound, upon undoubted rules of construction, to hold that Congress intended to include all claimants and parties not excluded. The right of this court to exercise jurisdiction claimed, as in this case, by a State against the Federal Government, has never been questioned, but has been exercised and conceded as existing.

State of Texas *v.* United States, 7 C. of C., 301.
State of Illinois *v.* United States, 20 C. of C., 342.
State of New Hampshire *v.* United States, 20 C. of C., 394.

~~EARLE & PUGH,~~
~~*Plaintiff's*~~